**U.S. Department of Labor**

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**Issue Date: 16 May 2007**

**CASE NO.: 2007-LDA-4**

**OWCP NO.: 02-144392**

**IN THE MATTER OF**

**R.M.[1],**
**Claimant**

**v.**

**SERVICES EMPLOYEES INTERNATIONAL,**
**Employer**

**and**

**INSURANCE CO. OF THE STATE OF PENNSYLVANIA,**
**Carrier**

**APPEARANCES:**

**GARY PITTS, ESQ.**
**On behalf of Claimant**

**DELOS E. FLINT, ESQ.**
**On behalf of Employer/Carrier**

**BEFORE: C. RICHARD AVERY**
**Administrative Law Judge**

[1] Pursuant to a policy decision of the Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

# DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Claimant against Service Employers International (Employer) and Insurance Company of the State of Pennsylvania (Carrier). The formal hearing was conducted in Pensacola, Florida on February 1, 2007. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[2] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-9, and Employer's Exhibits 1-14.[3] This decision is based on the entire record.

## Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The date of alleged injury/accident is September 26, 2005.
2. The injury occurred in the course and scope of employment.
3. An employer/employee relationship existed at the time of the alleged accident.
4. Employer was advised of the injury on September 26, 2005.
5. A Notice of Controversion was filed on May 3, 2006.
6. An informal conference was held on July 25, 2006.
7. The Claimant's average weekly wage at the time of injury is disputed.
8. Nature and extent of disability:
   (a) Temporary total disability from: October 13, 2005 to April 28, 2006.
   (b) Temporary partial disability from: N/A
   (c) Benefits were paid from October 13, 2005 to April 28, 2006 (28 and 2/7 weeks) at $1,047.16 per week. The total amount paid was $29,619.67.
   (d) Permanent disability is disputed.
9. Medical benefits were paid.
10. Date of maximum medical improvement is April 28, 2006.

[2] The parties were granted time post hearing to file briefs. Both parties did so timely.

[3] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages (TR. pp __); Joint Exhibit (JX- __); Employer's Exhibit (EX- __); and Claimant's Exhibit (CX- __).

## Issues

The unresolved issues in this proceeding are:

1. Nature and Extent of injury
2. Extent of permanent loss of wage earning capacity
3. Average weekly wage
3. Attorney fees, penalties and interest

## Statement of the Evidence

**Claimant**

Claimant testified at the hearing. He is 54 years old and grew up in Maine. He graduated high school in 1971 and currently resides in Pace, Florida. Since high school he has had a variety of jobs including carpentry, sales, and assistant store manager. Claimant also has a commercial driver's license that enables him to drive 18 wheelers. Since the 1980s he has driven trucks off and on for his livelihood. The most Claimant had earned, prior to Iraq, was $18.00 an hour working as a steamer operator in 2000.

In 2004 Claimant was working as a forklift operator earning $12.50 an hour when he applied for an overseas job with Employer. He was hired, passed the physical and went to Iraq on May 16, 2004 where, except for two or three rest and recreation (R&R) breaks[4], he remained until October 11, 2005. According to Claimant, his job duties in Iraq involved driving a truck full of army supplies from one base to the next. He was also responsible for tying down cargo and helping to load or unload cargo. The trucks drove in convoys of about 15 with three armed escorts. Claimant stated that he wore a helmet and a heavy body vest[5] and was attacked at least three times. Nevertheless, Claimant (and his wife subsequently in her testimony) stated that he was intent on staying in Iraq had he not been injured.

On September 26, 2005, while locking a chain on a flat bed truck trailer, Claimant fell backwards to the ground striking his head, right shoulder and right hip and leg. After this accident Claimant did not work again in Iraq. He spent

[4] Employer gave each employee a 10 day R&R period after three months of consecutive working. Claimant could not remember how many R&R breaks he actually took, but stated that at one point he worked six months straight without taking his R&R. Claimant testified that he worked seven days a weeks for at least 12 hours a day.

[5] The vests weighed approximately 50-60 pounds and Claimant had to lift it up and slide it down over his head to get it on.

about a week in bed, and then, following a CT scan and an MRI at the local clinic, he was sent home for medical attention.

Once stateside, Claimant placed himself under the care of Dr. Cesar Roca of Alabama Orthopedics. Surgery was performed on his shoulder and he was given lifting restrictions of no more than 20 pounds overhead. Claimant was declared at MMI on April 28, 2006. Claimant still has shoulder pain[6] and complains of vision problems[7] and poor memory[8]. Once released to work however, Claimant started driving a dump truck for a local employer and has done so ever since, earning $12.00 an hour plus overtime.[9] In 2006 he earned $15, 616.60 for the period that he worked following his medical release. (CX-5) The year prior, in 2005, he earned $74,264.61 working in Iraq. (CX-9) Claimant is not currently looking for any other work and is happy that his job lets him stay close to home.[10]

On cross-examination, Claimant acknowledged that although there were both forklift and truck driver positions available in Iraq, he chose to be a truck driver because they made more money. Claimant also conceded he could earn more money stateside if he would drive an 18 wheeler doing long hauls. This would require him to stay away from home during the week. Not only is Claimant reluctant to stay away from home, but he also stated that the companies he talked to required more experience than he has – or at the least, a return to school, which he estimated would cost about $5,000.

**Claimant's wife**

Claimant's wife of 24 years also testified at the hearing. She supported his claim of shoulder restrictions and vision problems. While she stated she would rather have Claimant home, she acknowledged that he had planned to stay in Iraq had he not been injured.

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[6] Claimant stated that he did not think he could return to his previous work in Iraq because he could not lift the heavy protective gear over his head to get it on.

[7] Claimant explained that prior to his injury he had his vision checked and there were no problems with his eyes. At his next eye appointment, following his injury and return home, he was told that he had a slight tear in his left retina which has since healed. Claimant did not have any additional problems with his eyes for almost a year and then in December 2006 he had an episode of double vision and was referred to a retina specialist.

[8] Claimant acknowledged on cross-examination that he had not seen a doctor regarding his memory since his return to the states.

[9] Claimant stated that he does have to chain cargo down to the trailer as part of his job. However, as compared to his job requirement in Iraq which involved lifting overhead, this job entails waist to chest lifting and thus Claimant is able to perform the work.

[10] However, he did initially investigate 18 wheeler jobs upon his return to the states.

**Nancy Favaloro, vocational rehabilitation expert**

Ms. Favaloro testified at the trial on Employer's behalf. She interviewed Claimant on January 4, 2007, reviewed his medical and work history and gave him a series of tests. She stated that he scored very well in reading and math and opined that he had transferable skills and could do a variety of jobs up to the medium category as long as they did not required lifting over head more than 20 pounds.

Ms. Favaloro identified, in both her testimony and report (EX-4), a number of job positions that she felt Claimant was qualified for. She identified a route salesperson job that involved delivering frozen food to customers in assigned area. This job paid $30,000 upon entry and increased to approximately $45,000 once the employee was established on his route. The second job identified was a service advisor for a car dealership which paid $35,000 to $55,000 per year. Third, was a job as a telesales representative which paid $8.25 per hour plus commission – although most employees averaged $12.00 to $15.00 per hour. Next, Ms. Favaloro identified a dispatcher job which paid $12.00 per hour. The fifth job listed was for a customer care representative which paid $11.50 per hour. The report also included a position for a call center account specialist which paid $12.00 per hour. The last job Ms. Favaloro identified was for an over-the-road truck driver doing no-touch freight jobs. She noted that Claimant should be able to earn, at entry level, $38,000 to $40,000 per year based on his experience. All of these jobs fit within Claimant's 20 pound overhead lifting restriction and are within the Pensacola, Florida area.

At trial Ms. Favaloro testified that she spoke with some companies that operate 18-wheelers. One company, Schneider National, uses team driving and pays an average salary of $125,000 per year and has 98% no-touch freight. The truck can be on the road for 20 hours a day instead of the standard 10 hours because they use team driving. This company actually had a job opening as of the day before trial for a team driver. There were also positions for bulk truck driving with no-hand unloading that pays a wage range of $37,000 to $75,000 depending on how often the employees drive. Schneider did not have a one year of experience requirement.

Ms. Favaloro noted that her report only considered Claimant's truck-driving experience while in Iraq, any other experience would serve to increase Claimant's earning potential above the $40,000 per year.

## Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the Claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

## Causation

Section 20(a) of the Act provides a Claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the Claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP,* 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant testified that on September 26, 2005 he injured himself while working as a truck driver in Iraq for Employer. Employer was advised of the injury that same day. Both Employer's counsel and Claimant's counsel have stipulated that Claimant was injured on September 26, 2005 in the course and scope of employment and that the injury was reported the same day. (JX 1)

Based on the facts and the party's stipulation, I find that Claimant has established a prima facie case of compensability with regard to the injury he suffered on September 26, 2005 in that he has established he suffered a harm and that working conditions existed which could have caused the harm.

No evidence was offered to rebut this presumption. Thus, based on the facts and stipulations of the parties I find that Claimant's injury was one arising out of or in the course of his employment.

## Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement (MMI) is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a Claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guaranty Ass'n v. Abott*, 40 F.3d 122, 29 BRBS 22 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979).

In the present case, the parties have stipulated, based on Claimant's treating physician's opinion, that Claimant reached MMI on April 28, 2006. Thus, based on the parties' stipulation and the evidence of record, I find Claimant to have reached MMI as of April 28, 2006.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A Claimant who shows he is unable to return to his former employment due to his work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a Claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen. dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

In the present case, Claimant has stated that he cannot return to his prior job in Iraq because of his shoulder. Dr. Roca, Claimant's treating physician, released Claimant to return to work as of April 28, 2006, but gave him a 20 pound overhead lifting restriction. (EX-1, pp. 32) Claimant stated that he is unable to lift the required body armor (that weighs 50-60 pounds) over his head to get it on and is also unable to strap down the loads carried on the trucks.

Employer has offered no evidence to refute Claimant's testimony and thus Claimant has established a prima facie case for total disability.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which the claimant is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

*Turner* does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992).

However, for job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *P & M Crane Co.*, 930 F.2d at 430.

In this case, Employer contends that although Claimant is currently working and earning $12.00 per hour, he is underemployed and is capable of earning more working as an over-the-road truck driver doing no-touch freight jobs.[11] Ms. Favaloro testified and noted in her report that Claimant could earn a starting salary of up to $40,000 working this type of job. While Claimant testified that he needed a year of experience in order to obtain this type of job, Ms. Favaloro spoke with a national trucking company, Schneider, who told her that Claimant's work in Iraq would qualify him for the job. She also noted that as part of her labor market survey and her experience as a vocational counselor in general, she had not learned of any requirement for one year of experience in order to be an over-the-road truck driver. Also, although Claimant did apply for these types of positions when he initially began searching for a job, he later decided he did not want to be away from home as much as these jobs would require even though he had chosen to be absent in Iraq.

I find that Employer has established suitable alternative employment for Claimant as an over-the-road truck driver earning $40,000.[12] Ms. Favaloro refuted Claimant's contention that he needed a year of experience in order to get one of these jobs and was specifically told by Schneider National that Claimant would be qualified. Although Claimant does not want to be away from home, this job would not require him to be away as much as he was while working for Employer in Iraq.

[11] Although Employer presented evidence regarding team driving jobs in which employees could earn $125,000 per year, and thus asserts that Claimant is not owed any additional compensation, I do not find this to be suitable alternative employment. This job requires the trucks to be driving for 20 hours at a time and thus utilizes a two person team to take shifts at driving. Claimant has never worked this type of job before and at the most worked 12 hour shifts at his job in Iraq.

[12] Ms. Favaloro noted in her report that these jobs paid between $38,000 and $40,000 starting salary. She also testified that since Claimant had a good bit of prior experience driving trucks, he would qualify for a higher wage.

Furthermore, Claimant's lack of desire to pursue higher paying jobs, similar to what he was willing to do while working in Iraq, is not a sufficient reason to allow him to benefit from a wage spike from working abroad.

I find that Claimant is permanently partially disabled as of April 28, 2006, the date of MMI. Claimant does not dispute compensation received prior to that period. Based on Employer's job survey of January 22, 2007, as of that time I find Claimant capable of earning at least $40,000 per year which equals an earning capacity of $769.23 per week. Prior to that time, and after reaching MMI, Claimant concedes he has had actual earning of $444.37 per week.

## Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked substantially the whole of the year preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 weeks of work was substantially the whole year, where the work was characterized as full time, steady and regular). The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-156 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently

been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section (c) is a catch-all to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation award under Longshore and Harbor Workers' Compensation Act (LHWCA) is determined by considering his previous earnings in employment in which he was working at the time of injury, reasonable value of services of other employees in same or most similar employment, or other employment of employee, including reasonable value of services of employee if engaged in self-employment. Longshore and Harbor Workers' Compensation Act, § 10(c), 33 U.S.C.A. § 910(c). *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997)

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). *Hayes v. P & M Crane Co.*, *supra*; *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. *See Story v. Namy Exch. Serv. Center,* 33 BRBS 111(1999).

In this instance, Claimant suggests computing his average weekly wage based on Section 10(a). Claimant did work for Employer for the entire year prior to his injury; however, he cannot be considered a traditional five or six day a week worker. Claimant worked seven days a week for three months and then was allowed 10 days off for R&R. Claimant, however, could not remember how many R&R breaks he actually took and stated that at one point he worked six months straight without taking his R&R. Thus, it is not possible to calculate how many days Claimant actually worked during this period. Based on these reasons I do not find Section 10(a) to be the best means of calculating Claimant's average weekly wage.

Nor can Section 10(b) be used because it applies to an employee who does not work substantially the whole of the year. Regardless, no information regarding wages of other employees in the same class has been provided for consideration.

Therefore, Section 10(c) is applicable. Employer urges this Court to apply a "blend" of Claimant's pre-Iraq earnings with his earning overseas to obtain an average weekly wage. Employer's brief references two cases[13] where such "blends" were used; however, in those cases the Claimants only worked overseas for a month and three months respectively. In the instant case, Claimant worked for Employer for approximately 17 months prior to his injury. There is no evidence to indicate that Claimant would not have continued working in this same capacity for the foreseeable future. In fact, both Claimant and his wife testified that had Claimant not been injured, he would still be working in Iraq. Claimant was clearly taking advantage of his new found earning capacity, and therefore, I find that using his earnings while working in Iraq is a fair and accurate estimate of Claimant's earning capacity at the time of his injury. Employer's Exhibit 9 indicates that for the year 2005 Claimant earned $74,264.61. Claimant worked from January 1, 2005 until his injury on September 26, 2005 which is 268 days or 38.28 weeks. Dividing $74,264.61 by 38.28 weeks equals an average weekly wage of $1,940.00.

## Section 14(e) penalties

Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days after it has knowledge of the injury. 33 U.S.C. §914; *Jaros v. Nat'l Steel Shipbuilding Co.*, 21 BRBS 26, 32 (1988). In this instance, Employer was notified of the injury on the date of the accident, September 26, 2005. (JX-1) Employer began paying compensation on October 13, 2005. From the date of the injury until October 13, 2005, it appears that Employer was continuing to pay Claimant wages. (CX-4) Therefore, Employer is not liable for Section 14(e) penalties.

[13] *Balthazar v. Service Employers International, Inc*., 2005-LDA-74 (January 19, 2006); *Fern v. Service Employers International, Inc*., 2005-LDA-46 (December 8, 2005).

## ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for permanent partial disability from April 28, 2006 (MMI) until January 22, 2007, based on an average weekly wage of $1,940.00 and a wage earning capacity of $444.37[14];

(2) Employer/Carrier shall pay to Claimant compensation for permanent partial disability from January 22, 2007 and continuing based on an average weekly wage of $1,940.00 and a wage earning capacity of $769.23;

(3) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(4) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(5) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

(6) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 16th day of May, 2007, at Covington, Louisiana.

A

**C. RICHARD AVERY**
**Administrative Law Judge**

[14] Claimant agreed he was satisfied with the compensation he received prior to reaching MMI and in his brief he acknowledges since that time he has earned an average of $444.37 per week. Additional suitable alternative employment at a higher income was not identified by Employer until Ms. Favaloro's report of January 22, 2007 (EX 4).